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VIA E-FILE

August 25, 2008

Ms. Anne Quinlan, Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35164; BNSF Railway Company – Petition for Declaratory Order

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket is BNSF's Amendment to Petition, Response to Comments and Renewed Request for Expedited Handling.

If you have any questions, please call me at (817) 352-3394.

Sincerely,

A handwritten signature in black ink that reads "Kristy Clark".

Kristy D. Clark
General Attorney

KDC/js

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

**AMENDMENT TO PETITION, RESPONSE TO COMMENTS AND RENEWED REQUEST
FOR EXPEDITED HANDLING**

**David Rankin
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2500 Lou Menk Drive
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Dated August 25, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY - PETITION FOR DECLARATORY ORDER

AMENDMENT TO PETITION, RESPONSE TO COMMENTS AND RENEWED REQUEST
FOR EXPEDITED HANDLING

INTRODUCTION

On July 15, 2008, BNSF Railway Company ("**BNSF**") filed a petition, pursuant to 5 U.S.C. § 554(c) and 49 U.S.C. § 721, requesting the Surface Transportation Board ("**Board**" or "**STB**") to institute a declaratory order proceeding to terminate a controversy or remove uncertainty with respect to two track relocation projects in Oklahoma City, Oklahoma (the "**Petition**"). One of the projects will involve the relocation of the portion of BNSF's Chickasha Subdivision located between milepost 540.15 and milepost 539.96 ("**Eastern Segment**") in about 18 months. The other project was the near-term need to relocate a short segment of BNSF's Chickasha Subdivision located between milepost 540.15 and milepost 541.69 ("**Middle Segment**"). BNSF is undertaking these projects at the request of the Oklahoma Department of Transportation ("**ODOT**") to facilitate the Oklahoma City I-40 Crosstown Relocation project ("**Highway Project**" or "**Project**").¹

The critical importance of the Highway Project to the citizens of Oklahoma City and the traveling public in general is set forth in the Petition.

While both relocation projects are routine in nature and of the kind undertaken almost daily by railroads without prior approval of the Board, BNSF opted to seek a prior ruling from the Board for two reasons. First, the two track segments that are being relocated were the subject of the notice of exemption in STB Docket No. AB-6 (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK* (not printed), served June 5, 2008 (“Oklahoma City Abandonment”), and BNSF does not want to appear to be circumventing the Board’s rejection of BNSF’s notice of exemption in that proceeding (“Oklahoma City Abandonment Proceeding”).² Second, Edwin Kessler (“Kessler”), a party to the Oklahoma City Abandonment Proceeding, filed a First Amended Complaint For Injunctive Relief, on June 27, 2008 (“Kessler’s Complaint”), with the United States District Court for the Western District of Oklahoma (“District Court”) seeking, among other things, an order from the District Court enjoining BNSF from relocating the two track segments at issue in this proceeding.

In the Petition, BNSF sought a ruling from the Board that the two relocation projects are not subject to the Board’s jurisdiction. BNSF also urged the Board to rule that the District Court may not enjoin the two projects on grounds that those projects require prior Board approval.

AMENDMENT TO PETITION

On August 14, 2008, the District Court issued an Order granting BNSF’s motion to dismiss Kessler’s Complaint. A copy of the Order is attached as Exhibit 1. In so doing, the District Court noted that the “STB has exclusive jurisdiction over transportation by rail carriers, including abandonments and rail line relocations.” Order at 4. In addition to dismissing Kessler’s Complaint for lack of subject matter jurisdiction, the District Court also denied

² The Oklahoma City Abandonment Proceeding also included the segment of BNSF’s Chickasha Subdivision located between milepost 541.69 and milepost 542.91 (“Western Segment”).

Kessler's motion to file a second amended complaint on grounds that the amendment would be futile. Order at 6.

In light of the District Court's Order, there no longer is any need for the Board to rule that the District Court is without jurisdiction to enjoin the two relocation projects and BNSF hereby seeks to amend the Petition accordingly.

RESPONSE TO COMMENTS

In the Petition, BNSF urged the Board to establish an expedited schedule for the filing of replies and the processing of this proceeding. Since the Petition was filed, ODOT, the Mayor of Oklahoma City and the Greater Oklahoma City Chamber ("Chamber") have filed letters supporting BNSF's request and urging the Board to expedite the processing of this proceeding. Even though the Board has not established a schedule for the filing of replies, to date comments in opposition to the Petition have been filed by Kessler ("Kessler Comments"), OnTrac ("OnTrac Comments") and Robert Waldrop ("Waldrop Comments"). Since it is uncertain whether the Board will establish a procedure schedule for the orderly processing of this proceeding, BNSF feels compelled to bring to the Board's attention the most egregious misstatements of facts contained in the comments.³

I. Kessler Comments

A. The Preferred Kessler Relocation.

Kessler makes the unsupported suggestion that it would have been less expensive and faster for BNSF to have relocated the Middle Segment 200 feet to the south of the former alignment rather than rebuilding the Packingtown Lead. Kessler Comments at 6. First and

³ To the extent that BNSF's response to the comments is viewed as a reply to a reply, BNSF seeks leave to file the response. See *Delaware & H. Ry. Co. v. Consolidated Rail Corp.*, 91 C.C. 989, 990 (1993).

foremost, if the Middle Segment had simply been moved 200 feet to the south, it would have been extremely difficult, if not impossible, to preserve service to Producers Cooperative Oil Mill ("Producers") and Mid-States Wholesale Lumber ("Mid-States") once the Eastern Segment is relocated without jeopardizing the Highway Project. By relocating the Middle Segment over the Packingtown Lead, rail access to Producers and Mid-States has been preserved directly from the Red Rock Subdivision as well as to and from the Chickasha Subdivision via the Packingtown Lead and the Red Rock Subdivision. But then again, Kessler's interest in this proceeding is not preserving rail service to shippers but crippling or destroying the Highway Project. Moreover, moving the former right-of-way 200 feet to the south would have been much more difficult from an engineering standpoint and would have involved destroying a public baseball field and erecting crossings over several city streets.⁴

Kessler's suggestion that the Board hold a hearing to determine which realignment of the Middle Segment is more cost-effective demonstrates the wisdom of Congress in not regulating relocation projects that do not adversely affect service to shippers, such as the two involved in this proceeding. Our Nation's rail network would quickly grind to a halt if railroad routing decisions were made in a public forum rather than by businessmen with railroad operations experience. More importantly, the issue in this proceeding is not which realignment is most cost-effective but whether the realignment chosen by BNSF requires prior Board approval.

B. The STB Lacks Jurisdiction Over Highway Projects.

⁴ Kessler claims that BNSF could have used the existing tracks and ties if BNSF had relocated the Middle Segment to Kessler's desired location. But BNSF could have done so only by disrupting service over the Chickasha Subdivision while the tracks were relocated. In rebuilding the Packinghouse Lead, BNSF was able to relocate the Middle Segment without any disruption to rail service. Again, Kessler's suggestions are self-serving and designed to cripple the Highway Project and not to preserve rail freight service in the area.

Kessler next asks the Board to hold an evidentiary proceeding to determine whether the Highway Project is more important than preserving rail service on the Chickasha Subdivision. Kessler Comments at 8. Indeed, Kessler argued before the District Court that the Board was the proper forum for deciding whether the corridor underlying the Eastern Segment and the Middle Segment should be occupied by a 10 lane highway, as the duly elected and appointed officials of Oklahoma desire, or a commuter rail line, as Kessler and his cohorts desire.

The problem with Kessler's request is twofold. First, the Board does not have jurisdiction over highway projects and is not in a position to assess which alignment is preferable. The Highway Project was approved by the Federal Highway Administration ("FHWA") on May 1, 2002. Having been unsuccessful at stopping the Highway Project before FHWA, Kessler now comes before the Board and seeks to have the Board trump FHWA's approval of the Project. The Board should summarily decline Kessler's invitation to overrule the FHWA decision. If Kessler does not like the Highway Project, he should voice his objections with the FHWA, which has jurisdiction over the Project.

Second, it is not the Board's responsibility to balance the wisdom of the Highway Project with the preservation of rail service on the Middle Segment and Eastern Segment. The overhead traffic formerly moving over the Middle Segment has already been relocated over the Packingtown Lead. As the Board well knows, the rerouting of overhead traffic is within the managerial discretion of the railroad and does not require Board approval. See, e.g., *Finnex Industries, Inc. v. ICC*, 897 F.2d 866 (7th Cir. 1990), *People of State of Illinois v. ICC*, 698 F.2d 868-873 (7th Cir. 1983). This policy reflects the well-established principle that the routing of overhead traffic and the selection of alternative routes for the handling of such traffic is a matter

of managerial discretion"), *Central Michigan Ry Co – Abandonment*, 7 I C C 2d 557 (1991), *Southern Pacific Transp Co – Abandonment*, 360 I C C 138 (1979). Therefore, even if the relocation of the Middle Segment were deemed to require prior Board approval, as Kessler claims, BNSF could elect to continue rerouting the overhead traffic via the Packingtown Lead. Moreover, the relocation of the Middle Segment does not affect service to local shippers since there are no shippers located on that 1.54-mile segment of track.

C. The STB Does Not Have Jurisdiction Over The Construction And Abandonment Of Industry Tracks.

Kessler concedes that the relocation of the Eastern Segment will not adversely affect overhead traffic. Kessler Comments at 9. Kessler also does not seriously contend that the relocation will adversely affect local traffic since, once the new connections to the industry tracks are re-installed directly from the Red Rock Subdivision (which is how Producers and Mid-States were originally serviced), BNSF will have continued access to the shippers. Instead, Kessler whimsically reclassifies the nomenclature of the tracks.

Under faulty logic, Kessler argues in his comments that: (1) the existing "spurs" extending north from the Eastern Segment to the facilities of Producers and Mid-States are not "spurs" but branch lines because they cross a UP rail line, (2) the new tracks being built to access Producers and Mid-States are lines of railroad because they traverse property owned by Mid-States; (3) the new tracks being built to access Producers and Mid-States are lines of railroad because they permit BNSF to access new markets due to the fact that the shippers are located north of a UP rail line (even though Producers and Mid-States are currently served by BNSF and are located to the east of BNSF's Red Rock Subdivision), and (4) because the construction of a crossing is regulated under 49 U.S.C. § 10901(d), the removal of a spur that contains a crossing requires prior Board approval. Pursuant to Kessler logic, a spur cannot be a

spur if the track crosses a line of railroad; a spur cannot be a spur if the track traverses property owned by a party other than the railroad, serving an existing customer over a relocated industry track is a penetration into a new market whenever another railroad is located nearby, and a spur cannot be a spur if it has a crossing. It is not surprising that Kessler has been unable to cite a single court or Board decision that supports these faulty legal theories.

In any event, the tracks at issue in the Eastern Segment are neither spurs nor lines of railroad, they are industry tracks. The construction of new industry tracks and the removal of existing industry tracks are not subject to the jurisdiction of the Board. 49 U.S.C. § 10906. Further, the relocation of these industry tracks is not subject to the Board's jurisdiction because the relocation does not involve an extension into or invasion of new territory (BNSF already serves both shippers) nor would the relocation affect service to shippers (BNSF would continue to serve the same two shippers over the new industry tracks once the existing industry tracks are removed).

Finally, Kessler's purported concern that BNSF may not have the requisite easements to construct the new industry tracks is unfounded. The new industry tracks will be located on property over which BNSF already has an easement with one very minor exception and BNSF has already reached an oral agreement with that property owner to slightly shift that easement to accommodate the new industry tracks.

Once the Eastern Segment and the Middle Segment are relocated and the new industry tracks are constructed, BNSF will be able to significantly improve the level of service to these two customers. Yet it is neither BNSF nor the Highway Project that stands in the way of improved service those two shippers, it is Kessler and his cohorts.

D. The Relocation of the Eastern Segment and the Middle Segment Has No Affect on Service to Boardman.

Attached to Kessler's Comments as Exhibit 1 is the Verified Statement ("VS") of Joseph T. Merry ("Mr. Merry"), Vice President of Boardman, Incorporated ("Boardman"). BNSF is troubled by some of the inaccurate and misleading statements made by Mr. Merry in his VS. If Boardman truly requires rail service, Mr. Merry should have contacted BNSF.

Kessler has suggested routings to preserve service to Boardman in his comments. Kessler's preferred routings, of course, traverse the corridor of the Highway Project and are impracticable, uneconomical and operationally infeasible. The routing from the west historically used to access Boardman is still in place, with two minor recent alterations. That routing, of course, does not suit Kessler's needs because it would not interfere with the Highway Project.

In his VS, Mr. Merry incorrectly states that Boardman's siding connects to the BNSF Chickasha Subdivision at milepost 541.5, which would place Boardman's plant in the Middle Segment. VS at 2. Boardman's siding is actually located at milepost 541.75 in the Western Segment.

Mr. Merry also incorrectly alleges that Boardman has been paying a "Switch Maintenance Fee" to BNSF. VS at 3. The invoice attached to the VS is for the lease by Boardman of three parcels of land owned by BNSF. There are no tracks located on the parcels and the only permitted use of the parcels is for storage. Attached as Exhibit 2, is a copy of the Lease.

According to BNSF records, the last time Boardman requested rail service was in June 2003, when it shipped two cars. The only other traffic moving either to or from Boardman since 2000, was one inbound car in February 2002. In other words, in the past eight years, Boardman shipped or received by rail a total of three cars, or about one car every three years. BNSF

decided to abandon the Western Segment because (1) there has been no local traffic on that segment of track for more than two years, (2) Boardman is the only customer on that segment of track, and (3) Boardman's traffic is not sufficient to justify retention of the Western Segment.

If Boardman has a new-found need for rail service, BNSF would be more than willing to work with Boardman to meet that need. In light of Boardman's comments in this proceeding, BNSF has contacted Stillwater Central Railroad, Inc. ("Stillwater") to work out arrangements whereby BNSF would grant Stillwater authority to operate over the Western Segment in order to serve Boardman. Stillwater currently serves a customer about six blocks to the west of the Boardman facility.

Contrary to Boardman's suggestion, BNSF has not isolated its Oklahoma City facility from the national rail system. All that is needed to resume service to Boardman from the west is the relocation of a signal and the incision of one piece of rail at S Agnew Avenue, where the Chickasha Subdivision connects to the rebuilt Packingtown Lead.

Kessler and Mr. Merry make several erroneous statements as to the condition of the tracks near the Boardman facility. Presumably, the misstatements by Mr. Merry are attributable to faulty information provided to him by Mr. Kessler. The three erroneous statements that directly impact service to Boardman are as follows:

First, the turnout that connects the Chickasha Subdivision to the Shields Spur was not removed. In fact, that turnout is used daily in rerouting the overhead traffic across the Packingtown Lead to the active Chickasha line to the east. Use of the Shields Spur, in any event, is not an operationally viable option for traffic moving to or from Boardman.

Second, BNSF did not sanction the removal of the cross-over track connecting the Chickasha Subdivision to the U.P. line. Attached as Exhibit 3, is a photograph of the Chickasha

Subdivision looking west at the location of the cross-over tracks. The rail line to the north is the UP line. As this photograph demonstrates, the portion of the cross-over on the BNSF right-of-way is still in place and BNSF certainly did not sanction the removal of the UP portion.

Third, as previously noted, rail access to Boardman has not been permanently severed from the west. Because Boardman had not requested rail service in five years, one piece of rail was removed near milepost 523.91 on January 27, 2008 when BNSF had authority to do so and a signal was erected in the right-of-way. The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced.

If Boardman is sincere in its efforts to restore rail service to its facility, it should work with BNSF and Stillwater. Boardman's siding can only accommodate rail service from the west which is how Boardman was traditionally served. The rail service Stillwater could provide from the west would be more economical and operationally efficient than the routing Kessler has chosen. Moreover, the routing via Stillwater would not interfere with the Highway Project whereas Kessler's route runs through the highway corridor which, of course, is Kessler's objective.

II. OnTrac and Waldrop Comments.

The comments by OnTrac and Waldrop show the motivation of the parties opposing the Petition. These parties do not want to preserve rail freight service to shippers and they are not interested in whether Boardman has or does not have rail service. Their sole objective is to keep the Highway Project from traversing a small parcel of land that formerly was a rail yard adjacent to Union Station. Photographs of the former yard are attached as Exhibit 4.

OnTrac seeks to have the Board second-guess the decisions made by FHWA and ODOT and force a realignment of the Highway Project. For example, OnTrac suggests that the

alignment of the Highway Project be moved 400 feet to the south. The fact that such a realignment would still require the relocation of sections of the Chickasha Subdivision does not seem to trouble OnTrac. Kessler and his cohorts presumably would not object to a relocation of the Eastern Segment and Middle Segment as long as such relocations preserve the former yard adjacent to Union Station.

Waldrop details his disagreements with ODOT, Oklahoma City and the Chamber with respect to the Highway Project. According to Waldrop, ODOT has made a "grave mistake" in locating the highway over the former yard adjacent to Union Station. Waldrop seeks to have the Board correct this grave mistake by ODOT by precluding the relocation of the Eastern Segment and the Middle Segment. Attached as Exhibit 5, is a copy of an e-mail being circulated by Waldrop soliciting comments to the Board from local citizens opposed to the Highway Project. Waldrop obviously would like to use the Board as a referendum on the Highway Project.

While BNSF does not believe the Board is the proper forum to address alignments of highway projects, BNSF commends OnTrac and Waldrop in the sincerity of their efforts and the forthright nature of their comments. Unlike Kessler, neither of these parties is hiding behind tenuous rail freight service issues to meet their objectives. Like Kessler, they are seeking to preserve a former rail yard, but they are doing so in an honest and honorable manner.

III. Renewed Request For Expedited Handling

In the Petition, BNSF explained that, even though the Middle Segment had been relocated over the Packtown Lead, removal of the tracks on the former alignment needs to be completed in order for the Highway Project to move forward. BNSF also noted that any delays would likely result in millions of dollars of cost overruns. Until this proceeding is completed, BNSF will not allow any further removal of tracks in the path of the Highway Project. In light of

BNSF's position, ODOT has been forced to stop work on the next planned phase of construction in the Middle Segment. Consequently, BNSF's inability to remove the tracks on the Middle Segment is already having serious, deleterious effects on the Highway Project. BNSF, therefore, respectfully urges the Board to process this proceeding in an expeditious manner so as to minimize the wasteful and unnecessary cost overruns.

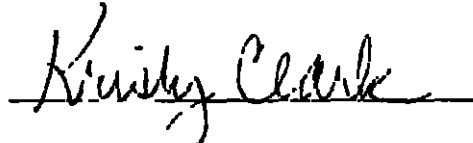
CONCLUSION

As the comments by OnTrac and Waldrop make clear, the opponents to the Petition are concerned about preserving a former rail yard and not about preserving freight rail service to BNSF customers. Kessler appears to be on a mission to derail the Highway Project in order to save a small plot of land where a rail yard was once located. It appears that Kessler, OnTrac and Waldrop want this small parcel of land to serve as the central hub for all local transit within Oklahoma City as well as the hub for an expansive interstate high-speed rail network.

The Board should not allow itself to become embroiled in a highway project or local transit issues. The issues presented to the Board in this proceeding are relatively simple and straightforward: do the relocations of the Eastern Segment and the Middle Segment require prior approval from the Board? Because neither of these relocations involves an extension into new territory and because no shipper located on either of these two segments will lose rail service, the Board should find that neither relocation is subject to its jurisdiction. Boardman is located on the Western Segment and is unaffected by the relocations. Boardman was historically served from the west and can continue to be served from the west. Kessler's fabricated rerouting of Boardman's traffic through the Highway corridor is a disingenuous ploy not to assist Boardman but to derail the Highway Project.

The Highway Project has been approved by numerous duly elected and appointed government officials at the Federal, state and local level. Their collective judgment should not be undone by a self-anointed guardian of the public good.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kisty Clark", is written over a horizontal line.

David Rankin
Kisty Clark
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131-2828

Dated: August 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been served on the following entities by first class mail this 25th day of August, 2008.

Fritz Kahn
8th Floor
1920 N Street, N W
Washington, DC, 20036-1601

Edwin Kessler
1510 Rosemont Drive
Norman, Oklahoma 73072

Robert M. Waldrop
1524 NW 21
Oklahoma City, OK 73106

On I'rac
Post Office Box 984
Norman, OK 73070

Joseph T. Meiry
Vice President
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1135 S McKinley Avenue
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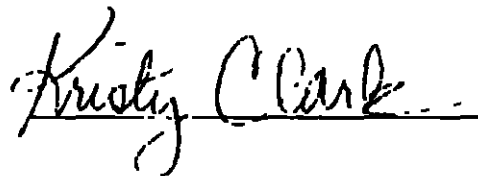
A handwritten signature in black ink, reading "Kristy Clark", is written over a horizontal line.

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

EDWIN KESSLER,

Plaintiff,

v.

Case No. CIV-08-358-R

**BNSF RAILWAY COMPANY,
and OKLAHOMA DEPARTMENT
OF TRANSPORTATION, Secretary
of Transportation, PHIL
TOMLINSON and Director GARY
RIDLEY, in their official capacity,**

Defendants

ORDER

Before the Court is Defendant BNSF Railway Company's motion to dismiss Plaintiff's first amended complaint [Doc. No. 36]. In support of its motion, Defendant argues that only the Surface Transportation Board (STB) and the United States have standing to enjoin rail line abandonments and relocations, citing 49 U.S.C. § 10501(b) and 28 U.S.C. § 2321-2325, and pointing out that there is nothing in the STB decisions of February 7, 2008 or June 5, 2008 that Plaintiff could enforce and specifically nothing in those orders that precluded BNSF from relocating its tracks. Defendant maintains that Plaintiff has cited no basis for jurisdiction herein. Additionally, Defendant asserts that Plaintiff lacks standing because, the abandonment proceeding having been declared void *ad initio*, Plaintiff has no right to submit an offer of financial assistance (OFA) and no viable claim that he is being injured, alternatively, Defendant asserts, the Court should decline to exercise jurisdiction in deference to the STB's primary jurisdiction, particularly given that the controversy between

Plaintiff and Defendant is now before the STB by reason of BNSF's petition for declaratory order filed with the STB on or about July 14, 2008.

Plaintiff in response first objects to Defendant's submittal of matters outside the pleadings with its motion and states that if the Court considers such matters, it must convert the motion to one for summary judgment and offer Plaintiff an opportunity to respond by presenting matters outside the pleadings. Matters outside the pleadings which Plaintiff has submitted are only submitted as part of his informal motion for leave to file a second amended complaint included in his response to Defendant's motion.¹ Plaintiff asserts Plaintiff argues that he is not asking the Court to intrude on the STB's exclusive and plenary jurisdiction but instead only seeks the Court's aid in the preservation of the STB's jurisdiction until the STB has had a chance to rule on Defendant's declaratory action before it, Plaintiff's and others' anticipated responses and to rule on any Feeder Line proceeding Kessler may file to protect Boardman's continued access to rail service. Plaintiff then suggests that Defendant's proposed unregulated relocation, which it has asked the STB to approve in its declaratory action, is really abandonment. Plaintiff asserts that he has standing to pursue this action by filing a second amended complaint in anticipation that the STB will hold that relocation is improper and also based upon the existence of a shipper, Boardman, which wants service, and Plaintiff's anticipated Feeder Line application to meet that service need. Plaintiff argues that the threat of injury to him is sufficient to confer standing but does

¹ Plaintiff's motion for leave to file a second amended complaint included in his response brief is improper. Motions to amend must be filed as separate documents, LCvR 7 I(c), contain certain required information and be accompanied by a proposed order. LCvR 7 I(f)

not really explain what that threat is. He suggests that the STB may not allow Defendant's relocation because of the existence of an affected shipper, Boardman, but require Defendant to submit a new abandonment petition. He further states that Defendant has already indicated that the Western segment of the track in question will eventually be abandoned and that Defendant's intention to remove the middle and Eastern segments of track without authority from the STB "has become even more certain because it now claims [in the declaratory action before the STB] that it can do so without any input from the STB." Plaintiff's Response to Motion to Dismiss at p. 19. Plaintiff implies that he should be permitted to file a second amended complaint to seek a judicial determination as to whether the STB has jurisdiction to decide Defendant's declaratory action and to preserve the status quo, *i.e.*, prevent Defendant from altering or relocating the track in question until the STB rules on the declaratory action (and on Plaintiff's anticipated Feeder Line proceedings) and/or this Court determines that the STB does not have jurisdiction to rule on Defendant's declaratory action. Plaintiff further states that under 28 U.S.C. § 1336(b), the Court can refer any question or issue to the STB for determination but then the Court retains exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul or suspend any STB order arising out of such referral. Plaintiff has not proffered a proposed second amended complaint, however

On June 5, 2008, the STB issued a decision declaring Defendant's notice of exemption and abandonment proceeding void *ad initio* and denying Plaintiff's other requests for relief, including his request for a cease and desist order, as moot. See STB Decision dated June 5, 2008 in STB Docket No. AB-6 (Sub-No. 130X)(Exhibit "1" to First Amended Complaint)

Consequently, there is no abandonment proceeding pending concerning the track in question and Plaintiff has no right to file an order of financial assistance (OFA). Nor is there any STB order pending that Plaintiff could seek to enforce. While it is possible Defendant may sometime in the future file an abandonment proceeding with the STB, that is by no means certain, particularly since Defendant has now filed a declaratory action with the STB requesting that the STB declare that the relocations of the middle and Eastern segments of the track in question are not subject to the STB's jurisdiction and that Defendant may continue to remove the remainder of the tracks on the Middle segment. See Petition for Declaratory Order before the STB (Exhibit to Defendant BNSF Railway Company's Motion to Dismiss). Thus, there is no injury to Plaintiff as a result of an abandonment proceeding that is "imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 123 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The STB has exclusive jurisdiction over transportation by rail carriers, including abandonments and rail line relocations. 49 U.S.C. § 1051(b). Not only is there no pending STB order in this matter which Plaintiff could seek to enforce, this Court only has jurisdiction over civil actions to enforce, enjoin or suspend orders of the STB for the payment of money or the collection of fines, penalties and forfeitures. 28 U.S.C. § 1336(a); *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 583-84, 86 S.Ct. 1000, 16 L.Ed.2d 109 (1966), and civil actions brought by the United States to enforce orders of the STB which are other than for the payment of money or the collection of fines, penalties and forfeitures, 28 U.S.C. §§ 2321(b) & 2322, see *Schwartz v. Bowman*, 244 F.Supp. 51 (S.D.N.Y. 1965), *aff'd*, 360 F.2d

211 (2nd Cir. 1966), *cert denied*, 385 U.S. 921, 87 S.Ct. 230, 17 L. Ed.2d 145 (1966). Additionally, since there is no pending STB order relative to the track at issue which Plaintiff can allege or show Defendant BNSF is not obeying, Section 11704(a) of Title 49 does not provide this Court with jurisdiction. 49 U.S.C. § 11704(a) ("A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part does not obey an order of the Board, except an order for the payment of money, may bring a civil action in the United States District Court to enforce that order under this subsection.") Thus, the Court concludes that it is without subject matter jurisdiction herein and would likewise be without subject matter jurisdiction over any second amended complaint proposed or filed by Plaintiff.

Nor do the facts that Boardman has been injured and/or will be injured as a result of Defendant BNSF's relocation of the subject tracks and/or that Plaintiff may file a Feeder Application with the STB provide this Court with jurisdiction under the above-cited statutes or provide Plaintiff with standing. Even if Plaintiff has alleged an injury sufficient to meet the constitutional requirements for standing, which Plaintiff has not done, the Plaintiff "must assert his own legal rights and interests and cannot rest his claim for relief on the legal rights or interests of third parties. *Aid for Women v Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006), *quoting Warth v Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L. Ed.2d 343 (1975).

Finally, if, as Plaintiff suggests here and maintains in his comments filed with the STB in Defendant BNSF's declaratory action, Defendant's proposed actions don't meet the criteria for unregulated relocations but must be taken as regulated abandonment requiring

Defendant to file abandonment proceedings, the STB will surely say so but that possibility provides no basis for this Court's subject matter jurisdiction or Plaintiff's standing.

In accordance with the foregoing, the motion of Defendant BNSF Railway Company to dismiss Plaintiff's First Amended Complaint [Doc. No. 36] is GRANTED and Plaintiff's First Amended Complaint against that Defendant is DISMISSED for lack of subject matter jurisdiction. Plaintiff's informal motion to file a second amended complaint is DENIED because amendment would be futile.

IT IS SO ORDERED this 14th day of August, 2008.

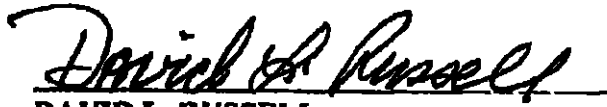

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

No. 2211

LEASE

TO

The Eschscholtz Company
240 S.W. 13th Street
Ocala, Fla., U.S.A.

Oil and Gas Lease

Industry Subsidiary

Revised February 1, 1957

Executed at Ocala, Fla. on February 1, 1957

the following described parcel of land sit or near Storage Yard, County of Oklahoma, State of Oklahoma, being a part of Leavie's right of way, to wit:

[illegible]

2 To pay all taxes, license fees and other charges that may be levied or assessed upon any and all improvements that may be placed upon said leased premises by Lessee.

3. To fully observe and comply with all Federal and State laws and Municipal ordinances, and all rules and regulations of Lessor now or hereafter in force, applicable to the use of said leased premises by Lessee as aforesaid.

4. To indemnify and hold harmless Lessor and said leased premises from any and all fines, liens, damages, forfeitures, penalties and judgments that may accrue upon said leased premises to the damage or injury of Lessor by reason of the occupation of said leased premises by Lessee, or from any cause whatsoever growing out of Lessee's use of said leased premises.

5 To keep said leased premises and all buildings thereon in a neat and orderly condition, and not to paint or post, or permit the painting or posting of, any signs or advertisements of any description upon any of said buildings or about said leased premises, except such as shall be approved by Lessor; and to place upon all buildings or structures erected upon said leased premises a sufficient number of "Post No Bills" signs to prevent others from painting or posting bills or advertisements thereon.

6. In case any improvement, building or structure upon said leased premises shall be damaged or destroyed, wholly or partially, by storm, fire or otherwise, Lessee will, within ten (10) days from the date of such damage or destruction, remove all debris, trash and rubbish caused by or incident to such damage or destruction. If Lessee shall fail to do so, Lessor shall have the right to enter upon said leased premises and remove such debris, trash and rubbish at the sole cost of Lessee, and Lessee agrees to pay such cost to Lessor within thirty (30) days after presentation of bill therefor.

7 Not to locate, erect, place or maintain, or permit to be located, erected, placed or maintained, any buildings, structures, fixtures, beams, pipes, wires, or materials or obstructions of any kind adjacent to or over any track of Lessor at less than lateral or overhead clearances prescribed by lawful authority, and in no event nearer than twenty (20) feet from the center line of main track, ten (10) feet from the center line of passing track, and eight and one-half (8 1/2) feet from the center line of any other track, or at a height of less than twenty-three (23) feet above the top of the rails of any such track; and to assume and to protect, save harmless and indemnify Lessor from and against all loss, damages and expenses, on account of death of or injury to persons, loss or destruction of or damage to property, caused or directly contributed to by reason of the violation by Lessee of any of the provisions of this paragraph. Any such violation shall immediately terminate this agreement without notice or any action on the part of Lessor.

8. To assume all damages resulting from want or failure at any time of title on the part of Lessor to said leased premises, or any part thereof, and all damages resulting from fire communicated from the right of way, premises, locomotives, trains, cars or other instrumentalities of Lessor, or otherwise, to property of any kind or character (including, among other things, buildings, structures, improvements, and the contents thereof) that may now or hereafter be upon said leased premises, or any part thereof, and to whomsoever the same may belong, whether any such damages shall be caused by negligence of Lessor, or any of its agents, servants or employees, or otherwise. Lessee covenants and agrees to release, and does hereby release, and to protect, save harmless and indemnify Lessor from and against any and all damages in this paragraph referred to, and all claims, demands, causes of action, suits, judgments, attorneys' fees, costs and expenses on account thereof.

9 To protect, indemnify and save harmless Lessor from and against all damages, claims, demands, causes of action, suits, judgments, attorneys' fees, costs and expenses suffered or incurred by Lessor, resulting from fire originating upon said leased premises, or in or upon any property located thereon (including among other things, buildings, structures, improvements, and the contents thereof) and communicated to any and all property of whatsoever kind or character (including among other things, contents of cars) located upon said leased premises or elsewhere, and to whomsoever same may belong, or resulting from injury to or death of persons, loss or destruction of or damage to property, caused in any manner by any act or omission, negligent or otherwise, of Lessee, or any of Lessee's agents, servants or employees; provided, however, that the provisions of this paragraph relating to damages by fire shall not apply to cars while on tracks of Lessor, but shall apply to contents of such cars.

10. If any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

11 In the event Lessee shall use an overhead pipe, swinging arm, conveyor or device of any kind in loading any commodity from tanks or reservoirs on said leased premises into cars on tracks of Lessor or Lessee, or from cars on tracks of Lessor or Lessee into tanks or reservoirs located on said leased premises, Lessee will not leave the tank cars connected with such overhead pipe, swinging arm, conveyor or device except during the times when at least one employee of Lessee will be in charge thereof. Lessee agrees to indemnify and hold harmless Lessor from and against all claims on account of injury to or death of persons, loss or destruction of or damage to property, resulting from the construction, maintenance, operation or use of any such overhead pipe, swinging arm, conveyor or device.

12. Failure of Lessee to occupy and use said leased premises for the purpose or purposes herein mentioned, or the use thereof for any purpose or purposes not herein mentioned, for thirty (30) days at any one time, shall be deemed an abandonment thereof. In the event of abandonment of said leased premises by Lessee, Lessor may declare this lease terminated and may re-enter upon and take possession of said leased premises, without being required to give notice thereof, with or without process of law.

13. Upon failure of Lessee to pay any bill for rental within thirty (30) days after rendition thereof, this agreement shall thereupon terminate without notice to Lessee or any action on the part of Lessor.

14. Upon the termination of this agreement in any manner, whether as herein provided or otherwise, (a) to remove from said leased premises all property of every kind and character thereon which Lessee may have the right to remove, and any such property not removed within 10 days after any termination hereof Lessee hereby conveys absolutely to Lessor, his successors and assigns; (b) to restore said leased premises to a condition satisfactory to Lessor; and (c) to surrender possession of said leased premises to Lessor, or its authorized agents, peaceably and without delay, and in case of any failure so to do Lessee shall be guilty of forcible entry and detainer of said leased premises under the statutes, and no notice to quit or demand shall be necessary to sustain such action, Lessee hereby saving all such notices and demands.

15 That either party may terminate this agreement and lease at any time upon thirty (30) days written notice to the other party, and upon expiration of thirty (30) days after the service of any such notice this agreement and lease and all rights of Lessee to possession hereunder shall absolutely cease.

16 Any notice to be given to Lessee hereunder shall be deemed to be properly served if the same be delivered to Lessee, or if left with any of Lessee's agents, servants or employees on the leased premises, or if posted on the leased premises, or if deposited in any postoffice or mail box, postpaid, addressed to Lessee at Lessee's last known place of business.

17 Lessee shall have no right to, and will not, assign this agreement or sublet said leased premises, or any part thereof, or permit the same to be used or occupied by any person, firm or corporation other than Lessee, without first obtaining the written consent of Lessor thereto.

18. If, upon the termination of this agreement Lessee shall have fully performed each and every of Lessee's obligations hereunder, Lessor agrees to refund to Lessee the pro rata rent, if any, for the unexpired period for which Lessee may have paid rent hereunder, provided the rental herein covered exceeds Twelve Dollars (\$12.00) per annum.

19. No termination of this agreement and lease shall release Lessee from any liabilities or obligations that may have been incurred by or that may have accrued against Lessee during the continuance of this agreement.

20. Lessee further agrees not to erect, place, maintain or store, or allow to be erected, placed, maintained or stored, any building or material closer than fifty (50) feet east of the east street line of Indiana Avenue in Parcel No. 1, or fifty (50) feet south of the south street line of Tenth Street in Parcel No. 3, as shown in blue print attached hereto and made a part hereof.

21. This agreement is issued in lieu of and supersedes that certain Lease Agreement No. L-11000 dated July 30, 1930, effective July 30, 1930, between St. Louis-San Francisco Railway Company and The Boardman Co.

Subject to the foregoing provisions, this agreement and lease shall inure to the benefit of and bind the respective successors, lessees, and assigns of the parties hereto. Each provision of this agreement relieving against or limiting liability shall inure to the benefit of each tenant of Lessor and each railway company or other person, firm or corporation that may at any time with the consent of Lessor operate engines, trains or cars upon any track or tracks of Lessor, or use any of the railroad facilities of Lessor.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement, the day and year first above written.

Paster description and Paragraphs 20
and 21 added prior to execution.

ATTEST:

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

By [Signature]
Superintendent

Secretary.

ATTEST:

The Boardman Co.

[Signature]
Secretary

By [Signature]
President (L. 11000)

WITNESSES.

As to Lessee.

with or without map - must be in any form the of at
the least, without the showing the entire map

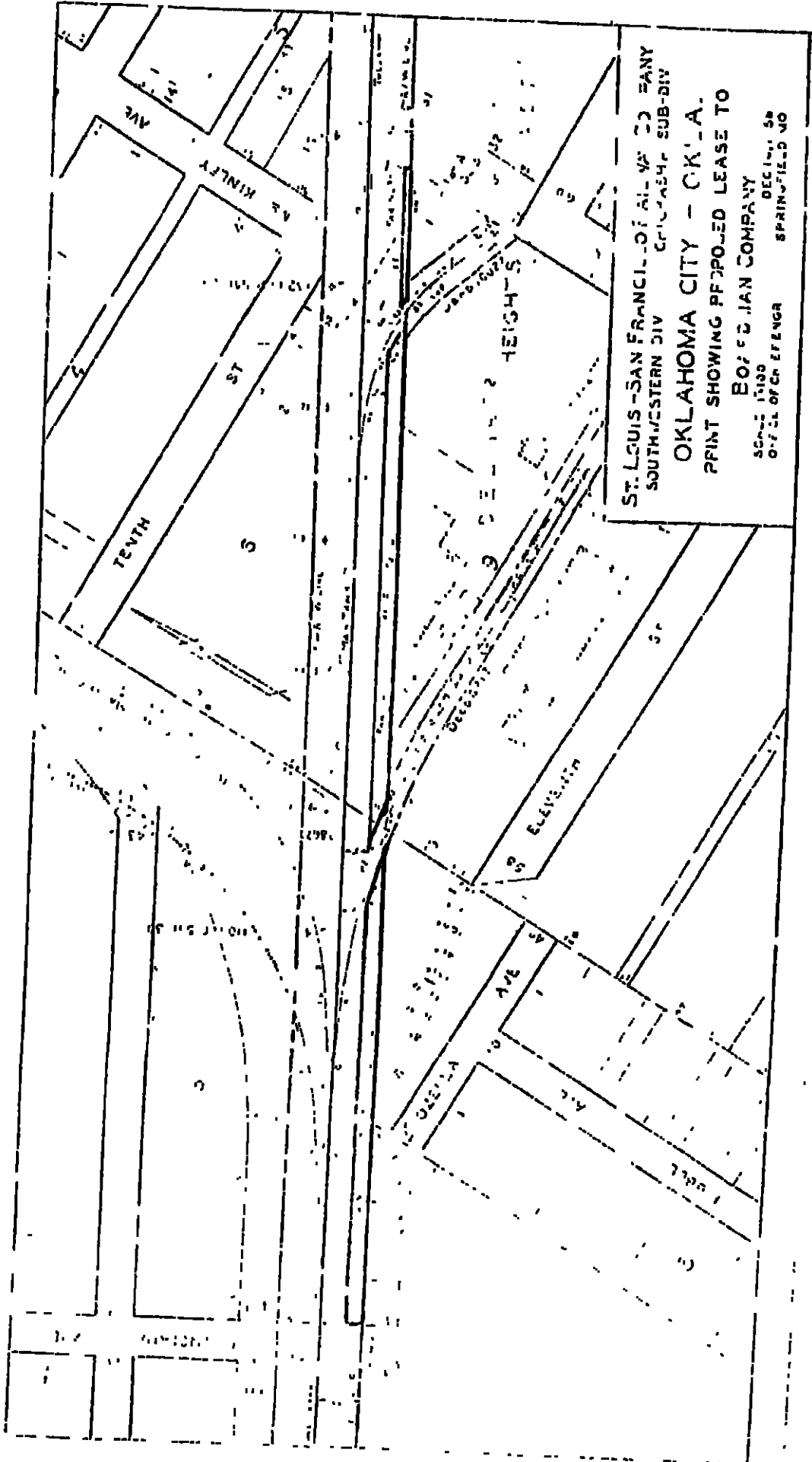


EXHIBIT 3



EXHIBIT 4

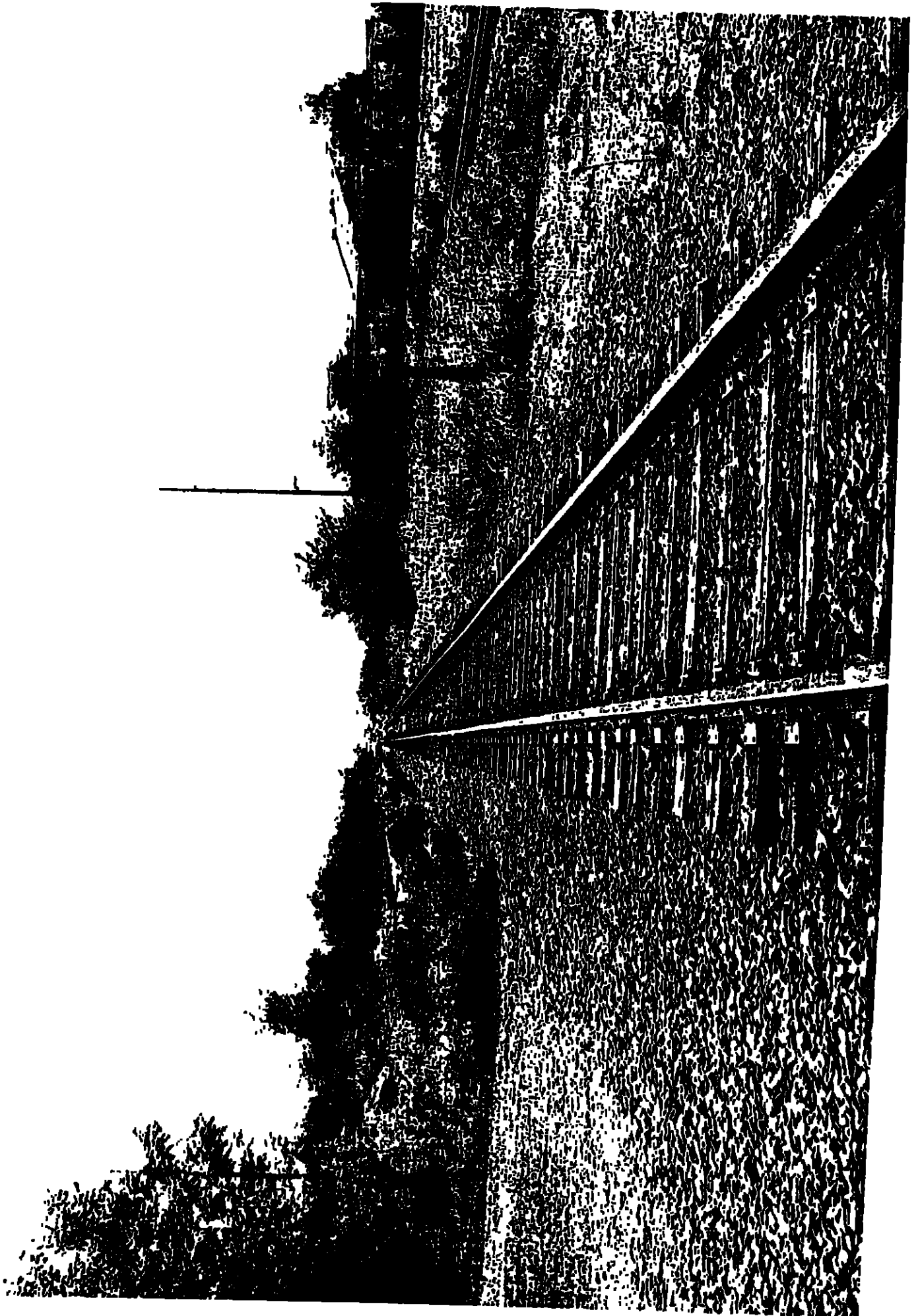




EXHIBIT 5



Date: Monday, August 18, 2008 7:04 PM

From:

To:

Subject: FW: "fish or cut bait" for public transportation

From: Mary Francis [mailto:mfrancis1@earthlink.net]

Sent: Saturday, August 16, 2008 4:12 PM

To: Susie Shields

Cc: UndisclosedRecipients@aol.com

Subject: "fish or cut bait" for public transportation ...

*****Please DISTRIBUTE*****

Are you wanting to save gas, reduce pollution and add a modern rail transit system here in OK?

Bob Waldrop says it's time to "fish or cut bait" and come to the defense of Union Station by opposing

the BNSF request for expedited handling and invite the Surface Transportation Board to come here to OKC

for a free, fair, and public hearing at a convenient place and a reasonable time.

Please read Bob's message below and re-write a few of his arguments for the Surface Transportation Board (STB) or use mine (attached.) It doesn't need to be long. We just need lots of comments.

Bob gives the link you need to file a comment.

Are you willing to spend 10 minutes or so to speak out for cheap, convenient public transportation?

Now is your chance. Mary Francis

P.S. Here is another reason to build rail, not tear it out. This is the basis of my one page comment (attached.)

A href="http://www.wheatstateok.us/Wheat%20Site/News%20and%20Info/News%20and%20Info/Link%20of%20Rail%20Service%20Hurting%20Oklahoma%20Wheat%20Producers%20and%20Livestock%20Levies%20%28news%20release%29.doc" target="_blank">Link of Rail Service Hurting Oklahoma Wheat Producers and Livestock, June 11, 2008

-- On Wed, 8/13/08, Robert Waldrop <bwaldrop@cox.net> wrote
From: Robert Waldrop <bwaldrop@cox.net>

Subject: [ok-sus] Comments to Surface Transportation Board

To: ok-suslists@okstateability.org

Date: Wednesday, August 13, 2008, 11:28 PM

As indicated in the news report submitted earlier by Tom Elmore, BNSF Railway Company has submitted a motion to the Surface Transportation Board for an expedited declaratory motion to allow it to proceed with the abandonment of 14 miles that are in the way of the 140 cross-country highway. If the STB grants this, then construction can proceed and the yard of Union Station is "just above accurate", it will be built under ten lanes of freeway that will be completely without

the time gasoline gets to ten bucks/gallon

If you would like to submit comments against this proposal, go to http://www.stb.dot.gov/stb/efilings.nsf and click on the link for "other submissions/correspondence"

The docket number is

Finance Docket-35184-0

(abbreviated as FD in the drop down menu) and the subject is

BNSF Railway Company – Petition for Declaratory Order

Then you can either type or copy your comments into the box, or upload an attachment. Your comments, name, and contact info become part of the public record.

I very strongly encourage everybody to "fish or cut bait" and come to the defense of Union Station by opposing the BNSF request for expedited handling and invite the Surface Transportation Board to come here to OKC for a free, fair, and public hearing at a convenient place and a reasonable time.

My comments are below my sig. Note that BNSF itself raises the issue of the Crosstown Freeway, so the project itself is fair game for comment. Time is running out, so comment today.

Bob Waldrop, Oklahoma City

August 13, 2008

Surface Transportation Board

395 L Street SW

Washington, DC 20423

Re: Finance Docket-35184-0 – BNSF Railway Company – Petition for Declaratory Order

To whom it may concern:

My name is Robert Waldrop. I am the founder of the Oscar Romero Catholic Worker community, an organization which is dedicated to the works of mercy, justice, and peace. We deliver food to people in need who do not have transportation. I was one of the founders of the Oklahoma Sustainability Network, and presently serve as one of the co-moderators of the organization's discussion listserv.

I write to you to oppose the motion for an expedited declaratory ruling and order that BNSF Railway Company filed with the Surface Transportation Board on July 15, 2008, regarding the Chickasha Subdivision in Oklahoma City, Oklahoma.

If the construction of the I-10 Crosstown Freeway is allowed to proceed as currently planned, which would be the result of this order, the Surface Transportation Board will become a willing party to a project to make presently being made by the State of Oklahoma's Department of Transportation.

The railroad at Union Station is the historic heart of our city and state's legacy of rail transportation. It could be the central focus of a cost-effective system of commuter rail transportation, central Oklahoma. But if the Surface Transportation Board allows BNSF to abandon this railway and thus part of OKCOT is proceeding with plans that the rail yard will be used for other uses of freight that will be on Union Station. But the freight yard will be used for other uses of freight that will be on Union Station.

oppose this for reasons of social justice, economic and environmental sustainability, and national security.

1. Social Justice

Oklahoma City has a long history of acting with grave social injustice against communities of people of color. The I-40 Crosstown Freeway relocation project has already destroyed hundreds of homes in two low income neighborhoods, and African American and Latin American citizens have borne a disproportionate burden of this social injustice.

Previously, ODOT conspired with leaders of Oklahoma City, including the Chamber of Commerce, to destroy the black heart of the African American community in Oklahoma City known as the Deep Deuce, in order to grab the land for "economic development" and to build a freeway to allow white citizens who were leaving the area because of the racial integration of the schools to be able to get to their jobs in downtown Oklahoma City quickly. That is widely recognized today as a grave historical error that was made by our regional and state civic, business, political, and transportation leadership. Abandonment of this rail line, which will lead to the destruction of the rail yard of Union Station, is a similar historical mistake that we are trying to prevent.

Some might say that these allegations are beside the point. Yet, the Mayor, ODOT, and the Chamber of Commerce claim in their letters to the Surface Transportation Board that they are acting with the support of the citizenry and on behalf of the common good. As a fourth generation Oklahoman, who is intimately familiar with the history of our political classes, I tell you plainly that their claims must be taken with a strong dose of the hermeneutic of suspicion.

I think it is safe to say that the abandonment of this rail line, leading to the relocation of the freeway and thus the destruction of Union Station is greatly desired by downtown business interests allied with certain political factions in town, but to go from that indisputable fact to a claim of "overwhelming public support" is a bit ingenuous.

Last year, Oklahoma City went through a process of soliciting public input on what the city needed, and by a wide margin the number one suggestion from the citizens was better public transportation. Yet, Oklahoma City is presently doing nothing to increase public transportation and by the City's own admission, it will be years before we see any substantive improvements. Thus, any claim by Oklahoma City, its Chamber of Commerce, or ODOT regarding public support for the destruction of the Union Station rail yard is simply political propaganda.

BNSF, Oklahoma City, ODOT, and the OKC Chamber of Commerce, wish to marginalize opponents of the destruction of Union Station, because that it is in their interest to do so. Their reliance on this tactic is a typical response of Oklahoma politicians to opposition. ODOT would have us believe that the low number of responses to the environmental statement on the I-40 relocation is an indication of community support. In reality, it is a testimony to the obscure nature of their comment process and the general feeling that there isn't any point in going against ODOT because they stack the deck against opponents before going into hearings or accepting comments.

So it goes in the political culture on the ground here in Oklahoma, and you should keep this context in mind as you make your decision in this matter.

2. Economic and Environmental Sustainability

The recent spike in fuel prices is but a harbinger of higher fuel and energy prices. Rail transportation is the most efficient way to move both freight and people. Oklahoma City, the region of central Oklahoma, and the State of Oklahoma need strong rail networks that can take people and freight to where they want and need to go. At this time, Oklahoma City has only a rudimentary public transportation that contributes little to the transportation needs of the area. Thus, our local community remains hostage to the good will of fascist terrorists.

Going into the uncertain future, the rail yard at Union Station could make an important contribution to the economic and environmental sustainability of this city and state. Once it is destroyed, it is gone, and that will seriously impact the interconnectivity of Oklahoma's system of railways. The possibility of rapid expansion of our rail system into a truly functioning, cost effective multi-modal transportation system anchored by commuter rail, will be gone forever. Allowing BNSF to abandon these lines, and thus permit ODOT to proceed with its construction plans, would be a tremendous step backward for rail in Oklahoma, at a time when we need to be moving ahead.

3. National Security

The peace and safety of the entire world is threatened by terrorists - and primary funding for the national international terror networks comes from petrodollars. Thus, when people don't like to think about this, every tank of gasoline they fill is a terror tax that buys guns and bombs that kill innocent civilians caught in the crossfire.

Oklahoma City is doing nothing to survive on the home front to protect the cause of and peace internationally. We politicians of all parties throughout the state can be heard only now and then their support for the federal government. This support policies that are more counterproductive than the federal government's policies. We are relying on a continued and safe source of funding for our operations. During World War II, people on the home front, through by reducing their consumption of critical materials, helped the state of Oklahoma badly. But it is a good our troops and do not put on the home front. We should be rapidly cutting out our material through out the state and working on an emergency basis to reduce our consumption of gasoline and diesel.

Instead, the end result of their proposals – the abandonment of this rail line to build a new ten lane highway – will be to make us more dependent on gasoline and diesel and thus it will come to pass that Oklahoma will make an even greater contribution to the support of terrorism. Abandoning this rail line which will lead to the destruction of Union Station's rail connections, is therefore in direct opposition to the cause of peace and safety throughout the world. Osama bin Laden would certainly approve of abandoning this rail line, destroying Union Station's rail yard, and finishing construction as designed of Oklahoma City's own ten lane freeway boondoggle. I vary not on, small or great, that makes us more dependent upon oil, undercuts the peace and safety of all Americans. In making transportation decisions we ignore it is reality to our mortal peril.

Conclusion

The rules and regulations interpreted and implemented by the Surface Transportation Board are there to prevent abuse of authority. The demand of BNSF, supported by ODOT, Oklahoma City, and its Chamber of Commerce, for expedited process is exactly the type of abuse of authority that the STB's rules and regulations are designed to prevent. I ask you to reject the BNSF application for an expedited declaratory ruling. You need to come to Oklahoma City for a public hearing on this matter that will be fair and open and held at a reasonable time and place.

If the Surface Transportation Board rejects this BNSF application, perhaps a compromise could result whereby the plans for the I-40 would be changed to avoid destroying the rail yard of Union Station and thus compromising the rail security of the entire state, e.g. by elevating a section of the proposed freeway relocation. ODOT has already reneged on its promise to bury the freeway in a ditch (they didn't do proper engineering studies before commencing construction, thus they made the promise to the neighborhood that they have already broken), so elevating a section to protect the rail access would not be impossible.

Sincerely,

Robert M. Whitrop

1524 NW 21

Oklahoma City, OK 73108

405-613-4688

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10) Comment to STB re Aug 08 doc

11) Lack of Rail Service Hurting Oklahoma Wheat Producers and Elevators (news release) doc